should have gone further and obtained a formal order fixing a time and place for completion, since a registrar's certificate is not an order and so is capable of being disobeyed. (See 37 *Court Forms* (2nd Ed) (1981 issue) 36.)

For the foregoing reasons, I am of the opinion that in the particular circumstances of the present case, as at the date of the issue of the bankruptcy notice, the judgment creditors were not in a position to commence execution proceedings, and it was not open to them to issue a bankruptcy notice. As I said in *Wee Chow Yong t/a Vienna Music Centre* v *Public Finance Bhd*[8] at p 511, '....it seems to me that a reading of the three judgments in that case makes it clear that the Court of Appeal held (as I have already said) that on the proper construction of the subsection concerned, to entitle a creditor to *issue* a bankruptcy notice he must be in a position to issue execution on his judgment *at the time when he issued his bankruptcy notice.*'

Accordingly, on this ground alone I would allow the application and set aside the bankruptcy notice with costs. In consequence, the bankruptcy petition is also set aside.

In the circumstances, the question whether, assuming the judgment creditors had obtained a supplemental order fixing the time and place for completion before issuing the bankruptcy notice, it was then open to them to enforce the judgment for specific performance by recourse to bankruptcy proceedings, does not arise and I express no opinion upon it.

Judgment debtor's application allowed.

Solicitors: *Rajasingam & Co; Presgrave & Mathews.*

Reported by *Eunice Lee*

Loo Swee Poo & Ors v Datuk Bandar & Ors

HIGH COURT (KUALA LUMPUR) — NOTICE OF MOTION NO R8-25-3-89
EUSOFF CHIN J
24 SEPTEMBER 1990

Food and Drugs — Seizure of packaged/tinned tea dust by third and fourth respondents — Application for the release of the tea seized — Whether seizure illegal, contrary to the provisions of s 4(1)(f) and (g) of the Food Act 1983 — Whether analyst's certificate obtained.

The third respondent (S Manoharan, Jabatan Kesihatan Bandaraya) and the fourth respondent (Dr Zainol Ariffin, Jabatan Kesihatan Bandaraya) had seized packaged/tinned tea dust belonging to the applicants. The applicants' solicitors wrote to the respondents to release the tea seized. Since there was no reply from the respondents, the applicants filed this application for the release of the tea seized on the ground that the seizure was illegal, contrary to the provisions of s 4(1)(f) and (g) of the Food Act 1983 ('the Act'). The question for decision is whether the seizure was illegal.

Held, allowing the application:

(1) The analyst's certificate under s 20 of the Act shall be the utmost evidence of the fact stated because under the Act, samples of any food, the definition of which includes drinks, must be sent to the analyst, who is required to give his certificate of analysis within 90 days, or else there would be no basis to institute prosecution for any relevant offence against the Act.

(2) The failure of the respondents in producing the certificate and to base a belief on a 1984 analyst's certificate is too remote to justify the third and fourth respondents' exercising their statutory powers in seizing and sealing the applicants' tea five years later on 5 May 1989.

(3) Labelling on the tea packets, tin or packages to the effect that colouring had been added, is not evidence that it contains colouring substances. The allegation on the label must be regarded as hearsay and inadmissible against the defendant.

(4) To found a 'belief' on the result of an analysis done some five years earlier in order to justify an action of seizure under s 4(1)(f) or (g) of the Act which came into force only on 1 October 1985 is certainly not reasonable. Section 4(1)(f) of the Act says 'believe' not 'suspect'. There must be reasonable grounds to support the continued detention of the seized tea dust and the respondents must satisfy the court that the seized tea or tea dust contained colouring substances.

[Bahasa Malaysia summary

Responden ketiga (S Manoharan, Jabatan Kesihatan Bandaraya) dan responden keempat (Dr Zainal Ariffin, Jabatan Kesihatan Bandaraya) telah menahan serbuk teh yang ditin kepunyaan pemohon. Peguam pemohon menulis kepada responden meminta teh itu dilepaskan. Oleh kerana tidak ada jawapan daripada responden, pemohon memfailkan permohonan ini untuk pelepasan teh yang ditahan atas alasan penahanan itu tidak sah, berlawanan dengan peruntukan s 4(1)(f) dan (g) Akta Makanan 1983 ('Akta itu'). Soalan untuk keputusan ialah sama ada penahanan itu tidak sah.

Diputuskan, meluluskan permohonan itu:

(1) Sijil penganalisa di bawah s 20 Akta itu adalah keterangan terutama tentang fakta yang dinyatakan kerana di bawah Akta itu, contoh apa-apa makanan, yang takrifnya meliputi minuman, mesti dihantar kepada penganalisa, yang dikehendaki memberikan sijil analisanya dalam tempoh 90 hari; jika tidak tidaklah ada apa-apa alasan untuk memulakan dakwaan untuk sebarang kesalahan yang relevan menentang Akta itu.

(2) Kegagalan responden menunjukkan sijil itu dan kepercayaannya kepada satu sijil analisa dari 1984 adalah terlalu jauh untuk menyokong tugas statutori mereka dalam menahan teh kepunyaan pemohon lima tahun kemudian pada 5 Mei 1989.

(3) Perkataaan pada label bungkusan atau tin teh itu yang menunjukkan pewarna telah dicampur, bukan keterangan yang ia mengandungi bahan pewarna. Dakwaan pada label itu mesti dianggap sebagai dengar cakap (hearsay) dan tidak boleh diterima terhadap defendan.

(4) Untuk mengasaskan satu kepercayaan ('belief') atas keputusan satu analisa yang dibuat lima tahun terdahulu untuk menyokong tindakan tahanan di bawah s 4(1)(f) dan (g) Akta itu yang hanya berkuatkuasa pada 1 Oktober 1985 adalah tidak munasabah. Seksyen 4(1)(f) Akta itu mengatakan 'mempercayai' ('belief') dan bukan 'mengesyaki' ('suspect'). Mesti ada alasan yang munasabah untuk menyokong penerusan tahanan serbuk teh itu dan responden mesti memuaskan mahkamah bahawa teh atau serbuk teh yang ditahan itu mengandungi bahan pewarna.]

[*Editorial Note*: The respondents' appeal to the Supreme Court vide Civil Appeal No 02-425-90 was heard on 2 May 1991 and the court (comprising Hashim Yeop A Sani CJ (Malaya), Mohamed Azmi and Gunn Chit Tuan SCJJ) dismissed the appeal.]

Case referred to

1 *Beh Heng Seong* v *PP* [1972] 2 MLJ 190 (folld)

Legislation referred to

Food Act 1983 ss 4(1)(f), (g), 19(2), 20
Food Regulations 1985 regs 260, 261

Low Hop Bing for the appellants.
Muhammad Shafee Abdullah for the respondents.

Cur Adv Vult

Eusoff Chin J: On 5 January 1989 at 2.30pm the third and fourth respondents had seized packaged/tinned tea dust belonging to the applicants. They issued the following notice of seal of the applicants' premises at 3/14 Jalan Udang Siar, Sri Segambut, Kuala Lumpur:

5 Januari 1989

Kepada:
Syarikat Hong Trading Co
No 3/14 Jalan Udang Siar,
Sri Segambut, K Lumpur

Per: Notis Sil

Sila ambil perhatian bahawa menurut peruntukan yang diberi di bawah s 4(1)(f) dan s 4(1)(g) Akta Makanan 1983 barang makanan seperti berikut: (Anggaran)

(1) 1,400 tin x 200g Serbuk Teh Cap Senapang.
(2) 1,310 bungkus x 840g Serbuk Teh Cap Senapang.

Oleh Pekilang:
(1) 2,000g x 1,278 — Serbuk Teh Cap Senapang.
(2) 240g x 1,315 bungkusan — Serbuk Teh Cap Senapang

yang diletak di No 3/14 Jalan Udang Siar, Sri telah disilkan oleh saya S Manoharan pada 5 January 1989 jam 2.50 petang.

'Berkhidmat Untuk Negara'

'Cintailah Bahasa Kita'

tt	tt	tt
.....	.....	.....
Tandatangan Pegawai	berkenaan	
S MANOHARAN	DR ZAINAL ARIFFIN	LOO SWEE POO
4557047	5049708	4442474

On 9 January 1989 upon instruction, the applicants' solicitor wrote to the respondents to release the tea seized. Since there was no reply from the respondents, the applicants filed this application for the release of the tea seized on the ground that the seizure was illegal and contrary to the provisions of s 4(1)(f) and (g) of the Food Act 1983. ('the Act')

On 2 February 1989, the application was fixed for hearing but the respondents' counsel said he was just given the cause papers by the Attorney General's Chambers that day. This was because the application had been served by the applicants' solicitors on the Attorney General pursuant to s 15 of the Federal Capital Act 1960 which states:

> The Attorney-General, the Solicitor-General, and any Federal Counsel may appear and plead and do all other things necessary in respect of any litigation or proceeding in any court in Malaysia in respect of any matter affecting the Commissioner or the affairs of the City.

On 19 April 1989, the application was heard by me, but upon application by counsel for the respondents, was adjourned for further hearing to 3 May 1989.

The applicants' counsel submitted that the seizure was not done legally as required by s 4(1)(f) or (g) of the Act which state:

> An authorised officer may, at any hour reasonable for the proper and better performance of his duty —
>
> (f) seize and detain for such time as may be necessary any food by means of or in relation to which he believes any provision of this Act has been contravened; or
> (g) mark, seal or otherwise secure, weigh, count or measure any food or appliance, the preparation, preservation, packaging, storage, conveyance, distribution or sale of which is or appears to be contrary to this Act.

The third respondent's affidavit (para 24) stated that the record kept by the first respondent disclosed that:

(i) The applicant had been fined $2,000 on 19 April 1984 (for what offence, it is not disclosed).
(ii) Sample of tea dust was taken on 1 June 1984 and found on analysis to contain colouring substances Tartrazine, sunset yellow FCF and Ponceau 4R. (It is to be noted that these happened in 1984. The Food Act 1983 came into force on 1 October 1985 vide PU(B)446/1985.)
(iii) A sample of tea dust was again taken from the factory premises of the applicant on 5 March 1986. (The result of the analysis, if the sample was sent to the analyst, is not disclosed to the court, or exhibited to the affidavit.)
(iv) Another sample of tea dust was taken on 11 March 1987 from the applicants' firm. (Again the result of the analysis, if samples were sent to the analyst, is not disclosed to the court, or exhibited to the affidavit.)
(v) Two samples of tea dust were taken from applicants' premises on 22 March 1988. (Again if it is for analysis, the result is not disclosed to the court, nor the analyst's certificate exhibited to the affidavit of Dr Zainol.)

Apparently the reason for the third and fourth respondents' action to seal the premises of the applicants was to determine if the applicants' tea dust contained colouring substances, and if so the applicants might be contravening reg 21 of the Food Regulations 1985. Their visit to the applicants' premises on 5 January 1989 was prompted by a letter of complaint by the Malayan Tea Producers Association dated 21 September 1987, alleging that the applicants had added colouring substances to the applicants' tea. The letter dated 2 September 1987, among other things, stated:

> Kami juga ada menghantarkan satu tin 'Teh Chap Senapang' di dalam tin asalnya dan tuan boleh mempastikan warna yang dicampurkan.

That letter was addressed to the Pengarah Perkhidmatan Kesihatan, Malaysia, who, 16 months later on 23 December 1988 forwarded the letter to the Pengarah Kesihatan, Dewan Bandaraya Kuala Lumpur.

It is to be noted that there is no evidence that the tin of tea sent to the Pengarah Kesihatan Malaysia, was ever sent to the analyst under s 7 of the Act to check if the allegations of the complainant was indeed established.

The affidavit of Dr Zainol at para 5 disclosed that the purpose of his visit to the applicants' premises on 5 January 1989 was to 'advise the applicant not to add colouring to the tea dust, and to further take appropriate action if necessary'.

What happened was that Dr Zainol decided to take samples of the applicants' tea dust for analysis. From his conduct, it may safely be assumed that he was not certain whether these tea dust in the applicants' premises indeed contained colouring substances, and if so, what were the substances. This led me to put a question to learned counsel for the respondents on the date of hearing, on 19 April 1989, as to whether a certificate of the analyst had been obtained on the samples of tea dust taken by Dr Zainol on 5 January 1989. I asked this question because I noted from Dr Zainol's affidavit that samples of applicants' tea dust had been taken on a number of occasions for analysis, but the respondents did not produce any analyst's certificate to the court to show what were the results of all the analysis, if done. Were the samples sent to the analyst for analysis? What is alleged in Dr Zainol's affidavit is that an analysis of a sample of the applicants' tea dust taken on 1 June 1984 under the repealed law revealed that the applicants' tea contained colouring substances which were permitted under the repealed law, and which substances under the present Act are now prohibited to be added to tea. To found a 'belief' on the result of an analysis done some five years earlier in order to justify an action of seizure under s 4(1)(f) or (g) of the Act which came into force only on 1 October 1985 is certainly not reasonable. Section 4(1)(f) of the Act says 'believe' not 'suspect'. Even 'suspicion' must be based on reasonable grounds.

In any event, it is vital that there must be reasonable grounds to support the continued detention of the seized tea dust. The respondents must satisfy the court that what had been seized was in fact tea or tea dust, and that the seized tea or tea dust contained colouring substances. Tea and tea dust are not tea or tea dust unless they comply with the special definitions described under regs 260 and 261 of the Food Regulations 1985, which are:

> 260(1) Tea shall be the product of steaming, drying or firing or any combination of these, or fermented, semi-fermented or non-fermented leaves, buds, and tender stems of one or more varieties of *Camellia*.
>
> (2) Tea —
>
> (a) shall not yield more than 7 per cent of total ash of which at least one half shall be soluble in boiling water;
> (b) shall yield not less than 30 per cent of water soluble extract; and
> (c) shall not contain spurious, exhausted, decayed or mouldy leaves or stalks and any foreign matter.
>
> 261 Tea dust, tea fanning or tea sifting shall be the dust, fanning or sifting of tea as specified in regulation 260. It shall not yield more than 5 per cent of ash insoluble in boiling water. For all other purposes, it shall comply with the standard for tea prescribed in regulation 260.

Section 19(2) of the Food Act 1983 states:

> Where any food has been purchased or procured from any person for analysis or examination, no proceedings in respect of the sale thereof or of any offence against this Act shall be instituted after the expiration of ninety days from the time of purchasing or procuring that food.

It appears that Parliament by s 19(2) of the Act requires that samples of any food, the definition of which includes drinks, must be sent to the analyst, and the analyst is required to give his certificate of analysis within 90 days, or else there would be no basis to institute prosecution for any relevant offence under the Act. Under s 20, an analyst's certificate shall be accepted as prima facie evidence of the facts stated therein.

Here, the samples of tea dust was taken on 5 January 1989, and when the case came before me on 19 April 1989 which was more than 90 days after the tea dust samples were taken, there was still no analyst's certificate though I inquired about it to satisfy myself that what was seized was indeed tea/tea dust, and that it contained colouring substances which is an offence under the Act.

The only ground appears to be the allegation in Dr Zainol's affidavit that the analyst's report in 1984 had confirmed that in 1984, the applicants had used colouring substances in his tea dust. Colouring in tea is not detectable by visual inspection, and therefore the analyst's certificate is of the utmost importance. However, to base a belief on a 1984 analyst's certificate is too remote to justify the third and fourth respondents' exercising their statutory powers in seizing and sealing the applicants' tea five years later on 5 January 1989.

Even labelling on the tea packets, tin or packages to the effect that colouring had been added, is not evidence that it contains colouring substances — see *Beh Heng Seong* v *PP*[1] in which it was held that the allegation on the label must be regarded as hearsay and inadmissible against the defendant.

I therefore make the order that the tea seized and sealed should be released by the respondents.

However, if the samples taken on 5 January 1989 had been sent to the analyst, and the certificate of analysis having been obtained before the release, shows that what has been seized is tea dust, and it contains colouring substances, the respondent should take immediate action under s 4(8) of the Act to have the tea dust destroyed.

Since no damages have been claimed by the applicants, I make no order as to damages. Costs awarded to the applicants.

Application allowed.

Solicitors: *Low Hop Bing & Associates; Shafee & Co.*

Reported by *Wong Kim Fatt*

Co-operative Central Bank Bhd v Belaka Suria Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S7-31-3853-87
LIM BENG CHOON J
10 MAY 1990

Land Law — Foreclosure proceedings — Stay of — Land charged to plaintiff as security for loan — Default in payment — Application for auction of land — Separate suit against borrower, guarantors and chargor — Application by defendant to stay foreclosure proceedings pending disposal of separate suit — Whether court should stay foreclosure proceedings — Similar issues in both suits — Whether plaintiff had locus standi to sue — National Land Code 1965, s 256

Banking — Co-operative society — Whether loan given by co-operative society illegal — Whether plaintiff could give loan secured by charge — Plaintiff's name misleading — Co-operative Societies Act 1948, ss 7 & 30 — Banking Act 1973, ss 2, 3(1), 9 & 59

By this originating summons, the plaintiff applied to this court pursuant to s 256(2) of the National Land Code 1965, for an order for sale by public auction of the land held under lot 5, Seksyen 87A, Geran 5875 in the town of Kuala Lumpur ('the said land') registered in the name of the defendant but charged to the plaintiff to secure a loan granted by the plaintiff to one Laura Hauw Soei Yong ('the borrower').

The plaintiff in the present action had instituted a suit ('the said civil suit') against the borrower, three guarantors and the defendant in the present action. The plaintiff in the said civil suit made an application for summary judgment which was heard by the senior assistant registrar ('SAR') who allowed summary judgment to be entered against all the defendants in the said civil suit. Thereupon all the defendants in the said civil suit appealed to the judge-in-chambers who found in favour of the defendants in the said civil suit and reversed the decision of the SAR. The plaintiff thereafter appealed against the decision of the learned judge to the Supreme Court which appeal is still pending. On 27 September 1988, the defendant applied to this court for an order that the hearing of this originating summons of the plaintiff and all further proceedings in the present action be stayed until the disposal of the said civil suit on the ground that the issues raised at the O 14 proceeding in the said civil suit and the issues raised in the present action were substantially the same,inter alia, that: (1) the plaintiff had no locus standi to sue as the registration of the plaintiff under the Co-operative Societies Act 1948 ('the 1948 Act') was in violation of s 9 of the Banking Act 1973; (2) the said loan advanced to the borrower was illegal for violation and contravention of the Banking Act 1973 and the Moneylenders Ordinance 1951. Both the plaintiff's and the defendant's applications were heard together.

Held, dismissing the defendant's application:

(1) The court was not convinced by the defendant's contention that simply because there was a pending action in the commercial division of the Kuala Lumpur High Court where judgment had been made in favour of the defendant and the matter had gone on appeal to the Supreme Court, this court should exercise its inherent jurisdiction to stay the present action. An appeal does not amount to a stay and an appellant has to apply to the court for a stay. In principle, a chargee has a right to institute an action for recovery of the debt and also